A

Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-23-18 OF 1993
KAMALANATHAN RATNAM J
15 JANUARY 1999

B

Companies and Corporations *— Directors — Duties — Duties and liabilities of director of company — Director obtained secret profit for himself — Whether director was in breach of statutory duties under s 132 Companies Act 1965 and as fiduciary of company*

C ***Companies and Corporations*** *— Directors — Duties — Duties and liabilities of director of company — Depletion of company's assets by directors — Assets tranferred to third party and leased back to company for which payments were made — Whether fraud upon company — Companies Act 1965 s 67(2)(c)*

Tort *— Conspiracy — Elements of — Conspiracy to injure — Whether first and second defendants guilty of conspiracy to injure*

D

Trusts and Trustees *— Trustees — Constructive trustee — First defendant is a trustee for company — Whether second defendant held monies received from first defendant as constructive trustee — Whether requirements to prove constructive trust have been satisfied*

E The plaintiff, and the first and second defendants entered into a lease-back agreement dated 2 January 1986 ('the agreement'). Under the agreement, the second defendant would transfer, among others, all his shares in the plaintiff to the first defendant and settle in full all outstanding loans and liabilities of the plaintiff, in consideration that the plaintiff would transfer its assets as enumerated in a schedule, a lease of land and the tenancy of its office to the second defendant. The F second defendant would, thereafter, lease-back the assets, and assign and transfer the tenancy back to the plaintiff. The first defendant, having gained control of the plaintiff, entered into a sub-lease agreement, dated 1 January 1986, with the third defendant. Under the sub-lease agreement, the third defendant would pay the plaintiff monthly rental and electricity and water charges in consideration to G the plaintiff for sub-letting a portion of its business premises.

The plaintiff's claims, as against the first defendant, as director and trustee of the company, an account of all monies received under the sub-lease agreement and payment of all sums received and found due after the taking of the account, and as against the second H defendant, as constructive trustee, similar account and payment of all sums found due from the second defendant to the plaintiff. Alternatively, the plaintiff's claim against the first, second and third defendants is damages for conspiracy to injure. In addition, the plaintiff contended that the agreement was in contravention with s 67 of the Companies Act 1965 ('the Act'). The second defendant, I however, argued that the agreement fell within s 67(2)(c) of the Act which provides for the giving of financial assistance by a company to its employees to purchase fully-paid shares in the company.

Held, allowing the plaintiff's claim:

(1) In all the circumstances, the court found that the first defendant had indeed taken the monies paid by the third defendant for the sub-rentals and the electricity charges and that he did not account at all to the plaintiff (see p 431G).

(2) The first defendant had clearly breached his duties as a director under s 132 of the Act, and as a fiduciary of the plaintiff as he had obtained secret profits for himself. He must therefore render a true and complete account to the plaintiff and to pay the plaintiff for all sums due and arising therefrom. By the agreement, the first defendant had received shares in the plaintiff by transferring the company's assets to the second defendant. This is a clear case of fraud upon the company by its director (see p 432I).

(3) There was a depletion of monies due to the company when monies were paid out to the second defendant and a depletion of the company's assets when the assets were transferred to the second defendant, and thereafter, by them being leased back to the company for which payments were made. This is not rendering financial assistance to the employees of the company to buy into the shares of the company, but a cleverly planned subterfuge to deplete the company of its assets (see p 436F–G).

(4) The law of conspiracy consists of an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, for the purpose of injuring another whereby the said act results in damage to the other. On the evidence available, there was conspiracy to injure between the first and second defendants because the said agreement stripped the plaintiff of its assets and required the plaintiff to lease back and pay for the very same assets that it once owned (see p 434H).

(5) Since the second defendant knew that the first defendant was a trustee of the company, the monies the second defendant had received from the first defendant pursuant to the agreement was deemed to be held by him as a constructive trustee. The advancement of payment by the first defendant on behalf of the plaintiff was in breach of trust and the receipt of the said sum was either actual or constructive knowledge of the breach, thus satisfying the two requirements to prove constructive trust (see p 438H–I); *Lian Keow Sdn Bhd v Chelliah Paramjothy & Anor* [1988] 1 CLJ 57 followed.

[Bahasa Malaysia summary

Plaintif dan defendan-defendan pertama dan kedua memasuki satu perjanjian pajakan balik bertarikh 2 Januari 1986 ('perjanjian tersebut'). Di bawah perjanjian tersebut, defendan kedua bersetuju memindahkan, antara lainnya, kesemua saham-saham yang dipegangnya di dalam plaintif kepada defendan pertama dan

menyelesaikan sepenuhnya semua pinjaman-pinjaman dan liabiliti-liabiliti plaintif yang belum dijelaskan, atas balasan plaintif memindahkan aset-asetnya yang disenaraikan di dalam satu jadual, dan pajakan tanah serta penyewaan pejabatnya kepada defendan kedua. Defendan kedua kemudiannya akan memajak balik aset-aset itu dan menyerahhak dan memindah penyewaan tersebut kepada plaintif. Defendan pertama, setelah mendapat kawalan ke atas plaintif, memasuki satu perjanjian pajakan kecil bertarikh 1 Januari 1986 dengan defendan ketiga. Di bawah perjanjian pajakan kecil itu, defendan ketiga bersetuju membayar kepada plaintif sewa bulanan dan bayaran-bayaran elektrik dan air atas balasan plaintif menyewa sebahagian daripada permis perniagaannya.

Tuntutan plaintif terhadap defendan pertama, sebagai pengarah dan pemegang amanah syarikat, adalah untuk satu akaun bagi semua wang yang telah diterima di bawah perjanjian pajakan kecil tersebut dan pembayaran kesemua jumlah yang telah diterima dan didapati terhutang selepas pengambilan akaun tersebut, dan terhadap defendan kedua, sebagai pemegang amanah konstruktif, satu akaun yang sama dan pembayaran kesemua jumlah yang didapati terhutang oleh defendan kedua kepada plaintif. Sebagai alternatif, tuntutan plaintif terhadap defendan-defendan pertama, kedua dan ketiga adalah ganti rugi bagi komplot untuk merugikan plaintif. Sebagai tambahan, plaintif menegaskan bahawa perjanjian tersebut adalah bertentangan dengan s 67 Akta Syarikat 1965 ('Akta tersebut'). Defendan kedua, walau bagaimanapun, menghujahkan bahawa perjanjian tersebut jatuh di bawah s 67(2)(c) Akta tersebut, yang memperuntukkan pemberian bantuan kewangan oleh syarikat kepada pekerja-pekerjanya untuk membeli saham-saham berbayar di dalam syarikat tersebut.

Diputuskan, membenarkan tuntutan plaintif:

(1) Di dalam semua keadaan, defendan pertama telah mengambil wang yang dibayar oleh defendan ketiga untuk sewaan-sewaan kecil dan bayaran-bayaran elektrik dan dia tidak memberi apa-apa akuan kepada plaintif (lihat ms 431G).

(2) Defendan pertama jelas telah memungkiri kewajipannya sebagai pengarah di bawah s 132 Akta tersebut, dan sebagai fidusiari plaintif, kerana beliau telah menerima keuntungan sulit untuk dirinya. Beliau mesti, dengan itu, memberi satu akaun yang benar dan lengkap kepada plaintif dan membayar kepada plaintif semua jumlah yang perlu dibayar dan yang timbul daripadanya. Melalui perjanjian tersebut, defendan pertama telah menerima saham-saham di dalam plaintif dengan memindahkan aset-aset syarikat kepada defendan kedua. Adalah jelas, satu penipuan telah dilakukan terhadap syarikat oleh pengarahnya (lihat ms 432I).

(3) Terdapat satu pengurangan wang yang perlu dibayar kepada syarikat apabila wang dibayar kepada defendan kedua, dan

pengurangan aset-aset syarikat apabila aset-aset itu dipindahmilik kepada defendan kedua yang kemudiannya dipajak semula kepada syarikat yang mana pembayaran dibuat untuknya. Ini bukan pemberian bantuan kewangan kepada pekerja syarikat untuk membeli saham syarikat, tetapi satu muslihat yang dirancang untuk mengurangkan aset-aset di dalam syarikat itu (lihat ms 436F–G).

(4) Undang-undang berkenaan pengkomplotan terdiri daripada satu perjanjian di antara dua atau lebih orang untuk melakukan satu perbuatan yang menyalahi undang-undang atau melakukan satu perbuatan yang tidak menyalahi undang-undang dengan cara yang menyalahi undang-undang dengan tujuan untuk merugikan seorang yang lain, yang mana perbuatan tersebut menyebabkan kerugian kepada orang tersebut. Atas keterangan yang sedia ada, wujud satu komplot untuk merugikan di antara defendan-defendan pertama dan kedua kerana perjanjian tersebut melucutkan plaintif dari aset-asetnya dan memerlukan plaintif untuk memajak balik dan membayar untuk aset-aset yang sama yang ia pernah miliki (lihat ms 434H).

(5) Oleh kerana defendan kedua mengetahui bahawa defendan pertama adalah seorang pemegang amanah syarikat, wang yang telah defendan kedua terima daripada defendan pertama di bawah perjanjian tersebut adalah disifatkan sebagai dipegang olehnya sebagai pemegang amanah konstruktif. Pembayaran pendahuluan oleh defendan pertama bagi pihak plaintif adalah pemecahan amanah dan penerimaan jumlah tersebut, sama ada dengan pengetahuan sebenar atau konstruktif tentang pemecahan itu, lantas memuaskan dua keperluan bagi membuktikan amanah konstruktif (lihat ms 438H–I); *Lian Kow Sdn Bhd v Chelliah Paramjothy & Anor* [1988] 1 CLJ 57 diikut.]

Notes

For a case on duties of directors, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 84.

For cases on financial assistance for purchase of company's shares, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 322–326.

For cases on elements of conspiracy, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 48–49.

For a case on constructive trustee, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1519.

Cases referred to

Duomatic Ltd, Re [1969] 2 Ch 365 (refd)

Electro Cad Australia Pty Ltd & Ors v Mejata RCS Sdn Bhd & Ors [1998] 3 MLJ 422 (refd)

Hospital Products Ltd v United States Surgical Corp & Ors (1986) 156 CLR 41 (refd)

Lian Keow Sdn Bhd v Chelliah Paramjothy & Anor [1988] 1 CLJ 57 (folld)
Makepeace v Rogers (1865) 34 LJ Ch 396 (refd)
Skelton v SA Blue Metals [1969] NZLR 955 (refd)
Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors [1996] 2 AMR 2633 (refd)

Legislation referred to

Companies Act 1965 ss 67(1), (2)(a), (b), (c), (3), (4), (5), (6), 132(1), (3)(a), (b), (5), 354(1)
Companies Act 1955 [NZ] s 62
Companies Act 1948 [UK] s 448(1)
Evidence Act 1950 s 114(g)

Ong Chee Kwan (*Brenda Chong* with him) (*Lee Ong & Kandiah*) for the plaintiff.
Prakash Menon (*Mohd Nazri* with him) (*Isharidah, Ho, Chong & Menon*) for the first defendant.
Shri Harry (*Gurbakhash Tan & Ezura*) for the second defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

FACTS

The plaintiff is in the business of manufacturing, inter alia, wooden doors and frames, and possesses various assets. It was also the lawful assignee of a lease of a piece of land known as Lot No 6532, Batu 5½, Jalan Kapar, 42000 Klang, Selangor. This was also its place of business. Form 49 of the Companies Act 1965 ('the Act') in the common agreed bundle of documents ('CABD') showed that the first defendant became a director of the plaintiff as of 3 January 1986, and his letter of resignation, dated 17 November 1990, showed that he had resigned as a director cum secretary of the plaintiff as of 17 November 1990. It is not in dispute that during his tenure of office, the first defendant was the director, primarily responsible for the financial management of the plaintiff.

The second defendant had bought over the plaintiff in 1980, and was its director from 1980 to 2 January 1986. There were only two shareholders in the plaintiff between 1980 to 2 January 1986, namely, the second defendant and his brother, Yam Chok. It is clear that the two of them injected much money in respect of the building and towards the running of the plaintiff. It is also not in dispute that the second defendant had pledged four of his own properties to UMBC Bank, to enable the plaintiff to benefit from overdraft facilities and term loans. In addition, the second defendant and Yam Chok also granted directors' loans to the plaintiff.

However, since the plaintiff was running at a loss, and the second defendant having lost heavily, the first defendant and one Duncan Yeong ('Duncan'), who were employees of the plaintiff, wished to take over the company.

The lease-back agreement

An agreement dated 2 January 1986 ('the lease-back agreement') was entered into between the parties whereby it was agreed, inter alia:

(a) that the second defendant and Yam Chok should transfer all their 1,000,000 shares (being all the shares in the plaintiff) to the first defendant and Duncan Yeong (PW3);

(b) the second defendant and Yam Chok should settle in full all the liabilities of the plaintiff with UMBC Bank;

(c) the second defendant and Yam Chok should settle in full all loans given to the plaintiff by the directors of the company;

(d) the second defendant and Yam Chok agreed that no new share or loan capital of the company will or will be agreed to be created or issued or transferred and no charge or other encumbrances be created or agreed to be created;

(e) the second defendant and Yam Chok agreed that the business of the company had been and would be carried on in the normal course and that no unusual or onerous contracts or engagement had been entered into by the company;

(f) the second defendant and Yam Chok also agreed that nothing had been or would be done in the conduct or management of the affairs of the company which would be likely to prejudice the interests of the purchasers, directly of the shares and indirectly of the company;

(g) and in consideration of (a), (b), (c), (d), (e) and (f) above, the plaintiff agreed to assign and transfer to the second defendant and Yam Chok:

  (i) the assets described under 'Asset I and II' of the First Schedule which only included the factory building, kiln dry room, plant and machinery. Assets which were not included were the floating asset, stock in trade and those assets which were, as of the date of this agreement, under leasing or hire purchase facilities;

  (ii) the lease of land held under CT No 26680 for Lot 6532 on which the plaintiff's factory is situated;

  (iii) the tenancy of the plaintiff's office at the ground floor of No 57 Jalan SS15/41B, Subang Jaya, for which the second defendant is the owner of the building; and

(h) the second defendant and Yam Chok thereafter agreed to:

  (i) lease-back the assets under (g)(i) above and the lease of the factory under (g)(ii) above to the plaintiff for a sum of RM3,000 per month from 1 January 1986 to 31 December 1986, and a sum of RM3,500 per month from 1 January 1987 to 31 December 1987, and thereafter, the parties were to negotiate on the monthly sum; and

  (ii) assign and transfer the tenancy, fitting and fixtures of the plaintiff's office under (g)(iii) above, back to the plaintiff for the sum of RM1,300 per month for two years commencing from

1 January 1986, and thereafter the parties were to negotiate on the monthly sum.

This arrangement was approved by a resolution of the plaintiff dated 2 January 1986.

The second defendant then left for Australia to stay with his children where he remained for nearly two years.

The sub-lease agreement

Having thus taken control of the plaintiff, the first defendant entered into an agreement, on behalf of the plaintiff, with the third defendant whereby in consideration of the plaintiff agreeing to sub-let a portion of the business premises occupied by the plaintiff at Lot 6532, $5^1/_2$ mile, Jalan Kapar, Klang, the third defendant agreed to pay the plaintiff:

(a) a sum of RM1,350 a month as rental; and

(b) all charges in respect of electricity/water consumed by the third defendant.

Although the agreement is dated 1 January 1986, the first defendant testified that it was only entered into after he took over the company, but that it was back dated to 1 January 1986.

THE CLAIM

The plaintiff now claims against the first defendant, based on his breach of duty as a director of the plaintiff and also as a trustee of the company:

(a) an account of all monies received by the first defendant under the sub-lease agreement entered into between the plaintiff and the third defendant (Soon Huat Rubber Works) dated 1 January 1986.

(b) payment of all sums received and found due after the taking of the account, with interest.

As against the second defendant, the plaintiff's claim is based on constructive trust, in that it is alleged that the second defendant had received monies paid by the third defendant to the first defendant, even though the second defendant knew or ought to have known that the monies paid to him in fact belonged to the plaintiff. In the circumstances, the plaintiff seeks similar account and payment of all sums found due from the second defendant to the plaintiff.

Alternatively, the plaintiff claims against the first, second and third defendants damages for conspiracy to injure.

It must be noted that judgment in default had been entered as against the third defendant well before this trial.

FINDINGS OF THE COURT

As against the first defendant

The first defendant testified that he had decided to sub-lease a portion of

the plaintiff's premises to the third defendant in order to subsidize the payment to the second defendant for the sums due under the lease-back agreement. It is pertinent to note that the second defendant had testified in respect of the lease-back agreement as follows:

> At that point of time, my brother and I owned 100% of the company. We didn't take any money from the purchasers. There was no transaction of cash. It was a free gift to them. It is fair that I salvage some returns by way of rental or transfer of assets.

In the light of this admission by the second defendant, and knowing that the plaintiff had no money to pay him and considering the fact that the sub-lease agreement followed hot on the heels of the lease-back agreement, I reject the first defendant's contention that no payment was to be made to the second defendant until the second defendant had fully settled the company's liabilities with the bank. In fact, it is my finding that payment to the second defendant must have commenced as soon as the rentals were being received. This finding is supported by reference to cl 6 of the lease-back agreement which expressly provided that upon execution of the said agreement, the assets as stated in the second schedule (which included the sums specified for lease of the assets and for the tenancy), 'shall be paid to the vendors for the lease and the tenancy'. Whilst admitting that he was only paid a sum of RM50,000, the second defendant admitted to receiving RM2,000, but as for 1987, there was no further negotiations because, as he said:

> The reason there was no negotiation was because they wouldn't even pay me the stated sums. They just paid RM2,000 a month by two cheques of RM1,000 each cheque. And all cheques paid to me were the plaintiff's cheques.

I also have to bear in mind the first defendant's admission in evidence that after 1986, that is, for 1987, the sub-rental income was not banked into the company's account. The reason stated was that since the said payments were banked in, in 1986, the plaintiff had to pay RM6,000 in taxes as the income was classified as 'non-trade income'. Firstly, this defence is totally unacceptable. It clearly amounts to tax evasion and not tax avoidance, which is acceptable. When asked what happened to the sums collected, the first defendant's response was that Duncan used to collect the payments. However, this is contrary to the evidence of Duncan who was called as a witness for the plaintiff. He testified that he was not involved in the collection of the rental but sometimes, out of convenience, he would be asked to collect some cheques. It is also to be noted that according to the evidence of the second defendant, the first defendant did not pay any sum to him after 1987. In fact, besides the sum of RM50,000, no further sums were paid to him. This was why he sued the plaintiff in 1992, after the first defendant had left the company. However, as against this, I have the first defendant's own admission that he had continued to collect the sub-rentals and the electricity payments from the third defendant from 1986, until he left the plaintiff in 1990.

I reject the first defendant's evidence that he had left the collection of the sub-rentals and the electricity payments to Duncan, and also that he did not know how much was received for electricity payment each month. The first defendant was the managing director of the plaintiff and the director primarily responsible for the financial management of the company.

I had watched the first defendant testify. I find that the first defendant had not testified truthfully. His evidence in court was in direct contrast with his pleadings. In his defence (paras 5 and 11), he denied even receiving the sub-rentals and electricity charges which were specifically referred to in the statement of claim. However, in evidence, he admitted receipt of the same and also stated that these amounts were never banked into the company's account after 1986. Further, the first defendant stated in evidence that he had injected funds into the plaintiff in 1986, and when asked for evidence of the same, he was only able to show that the debt owed by the plaintiff to the first defendant was capitalized into shares. This is a far cry from injecting funds. If this issue had not been challenged, the first defendant would have this court believe that he had indeed injected fresh funds into this ailing company and thus was able to pay the second defendant. It is shocking to note that the first defendant had indeed caused all assets of the plaintiff to be transferred to the second defendant and yet he never took steps to show this in any of the audited accounts of the company after 1986.

In respect of the electricity charges, the third defendant said in evidence that the monthly sum was between RM2,000 to RM3,000. This was not challenged by the first defendant and yet the first defendant attempted to show by reference to the electricity and water payments for the company for the year 1986, as amounting to RM17,963, thereby averaging at RM1,246 per month and for the year 1987, as amounting to RM12,760, thus averaging RM1,063 per month respectively. There is no logic in this explanation. The first defendant testified that the third defendant did not begin operation until 1987, yet it seems incongruous that the cost of electricity usage was less after the third defendant had begun operation in 1987, as compared to the average use in 1986. Obviously, the accounts relied on by the first defendant cannot be acceptable.

Cheong Fook Sdn Bhd (Cheong Fook)

One Chew Sing Chow (PW5), testified that in early 1990, his company, Cheong Fook, bought over the plaintiff. Whilst he with two others owned 30% each, the first defendant was given the remaining 10% as an incentive to continue to manage the company for Cheong Fook. He testified that the first defendant had represented to him that the plaintiff had a good potential to be profitable if funds were available to finance its operation. He maintained that he was not informed by the first defendant that the plaintiff had in fact transferred all its assets to the second defendant and to Yam Chok, and that they had in turn leased the assets back to the company for a sum of RM3,500. He opined that he would not have bought the shares in the plaintiff if he had known that the company had no assets. Referring to

the accounts of the plaintiff, exhibited at CABD 38, showing the assets of the plaintiff as at 31 December 1987, PW5 testified that even in the said accounts, the said assets and machineries were represented as belonging to the company when they had indeed been transferred to the second defendant and to Yam Chok. He was also not informed of the lease-back agreement and of the sub-lease agreement. After the first defendant had resigned, he had appointed PW2, Tan Soon Keat, one of the 30% shareholders, as the managing director. Upon being informed by PW2 that the first defendant had received payments of the sub-lease and the electricity charges, and after seeing the lease-back agreement and after obtaining a written statement from Duncan who had confirmed to him that the first defendant had indeed received the said payments, he made an appointment with the first defendant together with PW4, Wong Wai Tuck, the plaintiff's marketing manager, to meet at the PJ Hilton Hotel Coffee House. He testified that he showed the first defendant the lease-back agreement and the statement signed by Duncan, and pointed out to the first defendant that he had indeed taken monies belonging to the company. Since they were both friends, he enquired how it was possible for the first defendant to do this to a friend. The first defendant's response was that if he had shown the lease-back agreement to him, Cheong Fook would not have invested in the plaintiff. When asked about the sub-lease and electricity payments, the first defendant made no reply. When asked how he proposed to repay the sum of RM300,000 to RM400,000 which PW5 said he had, upon a rough and ready calculation arrived at, the first defendant responded by saying that he would revert in one week on the mode of repayment. Since the first defendant did not contact him, and after numerous futile efforts at contacting the first defendant, PW5 contacted the first defendant's eldest brother, one Steve Low Shu Yok, an architect. Another meeting was held around 18 Janaury 1993 at the NPC Hotel, Petaling Jaya. This time, in addition to the earlier parties, Tan Soon Keat (PW2) also attended together with the first defendant's eldest brother. When the entire story was narrated to the eldest brother, the latter advised the first defendant to check on the actual amount and that he himself would help to settle the amount with the plaintiff. Neither of them contacted him since.

A B C D E F G

I had watched PW5 testify. He was subjected to intense cross-examination by Mr Menon, counsel for the first defendant. He was composed and answered questions unhesitatingly. I accept his evidence as opposed to that of the first defendant. To my mind, leaving aside the demeanour and candour of PW5, even common logic moves me to accept his evidence. It was the case of the first defendant that PW5 was at all times aware of the lease-back agreement and the sub-rental agreement. I find that it makes no commercial sense for PW5 to invest in the plaintiff if he had known that all the assets of the plaintiff had in fact been assigned or transferred out to the second defendant. The first defendant's explanation that so long as the second defendant did not settle the UMBC Bank loan, the assets still belonged to the company, is to make a mockery of the lease-back agreement. In any case, a reading of cl 4 of the said agreement does

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not show that the second defendant's settlement of all the loans with the bank was a pre-condition for the lease-back agreement to be effective. Clearly, the first defendant was adroit at equivocation and prevarication. Unfortunately for him, I find that he is unable to talk his way out of this court. To my mind, the first defendant had methodically and calculatively managed to hoodwink PW5, whose friend he was and who trusted him, into buying a company that had no assets. Having schemed his way through the plaintiff, he also diddled Cheong Fook. I find that there was no way that PW5 would have known of the lease-back agreement since the first defendant, even in the audited accounts ending 31 December 1987, failed to disclose the same to his auditors. As for the sub-rentals and the electricity charges, they were never banked into the plaintiff's accounts and therefore, PW5 would never have known of the same.

It was in any case open to the first defendant to have called his own brother to deny the evidence of PW5. Once PW5 had testified that the first defendant's eldest brother was a party to the negotiations that took place in the hotel, and whereby the first defendant was directed by the brother to ascertain the exact amount due so that it could be settled, and if such a discussion did not indeed take place, then surely it would have been incumbent upon the first defendant to have called his brother to testify. The failure on his part to rebut this evidence, which evidence was corroborated by PW4, Wong Wai Tuck, who was present at that time, also calls for this court to invoke the applicability of s 114(g) of the Evidence Act 1950, against him. I therefore infer that if the eldest brother had been called, he would have no doubt confirmed PW5's and PW4's evidence.

There was a cheque, for RM3,534.40 as shown in CABD 128, that was issued to the first defendant by the third defendant specifically. The first defendant's attempt to explain this away as being part payment to him in consideration of the transfer of his shares and his resignation as a director of the plaintiff defies credibility.

In all the circumstances, therefore, it is my finding that the first defendant had indeed taken the monies paid by the third defendant for the sub-rentals and the electricity charges and that he did not account at all to the plaintiff.

The duties and liabilities of a director of a company are governed by s 132 of the Act. The relevant provisions in respect of this case are:

> As to the duty and liability of officers
>
> (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> (2) ...
>
> (3) An officer or agent or officer of the Stock Exchange who commits a breach of this section shall be —
>
> (a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach; and
>
> (b) guilty of an offence against this Act.
>
> Penalty: Imprisonment for five years or thirty thousand ringgit.

(4) ...

(5) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

In addition to the above stated statutory impositions, a director is also in a position as a fiduciary of the company, being a person entrusted with the assets of the company and whose duty is to perform to the best interest of the company. In *Hospital Products Ltd v United States Surgical Corp & Ors* (1986) 156 CLR 41, Gibbs CJ, reflecting the majority view of the High Court of Australia, had this to say in respect of fiduciary duty (at p 68):

> The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another — ie partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.

This passage was quoted with approval by our Court of Appeal in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors* [1996] 2 AMR 2633 at p 2665. It is my judgment that a director who acted in his own interest has, therefore, breached his duty as a trustee of the company. In particular, I hold that where monies or assets belonging to the company are transferred to the director, he shall hold the same under a resulting trust. In *Makepeace v Rogers* (1865) 34 LJ Ch 396 at p 397, Stuart VC said:

> ... I conceive that, wherever the relation between the person who seeks an account and the person against whom it is sought arises out of an employment which partakes of a fiduciary character, the fiduciary character of the employment imposes upon the person employed, the duty of keeping accounts and of preserving vouchers, and, according to the old law, which I trust will continue to be the law of this court, a bill in such a case for an account in equity may be sustained.

No doubt, as a director of the plaintiff, the first defendant became its agent and it is my judgment that the plaintiff, as the principal, is entitled to demand that the first defendant account for any or all of the secret profits received by him. From the facts of this case, I find that the first defendant had clearly breached his duties as a director and as a fiduciary of the plaintiff. He had obtained secret profits for himself and I hold that he must, therefore, render a true and complete account to the plaintiff and to pay the plaintiff for all sums due and arising therefrom. In fact, by a simple device of the lease-back agreement, the first defendant had received shares in the plaintiff by transferring the company's assets to the second defendant and to Yam Chok. This, to my mind, is a clear case of fraud upon the company

A by its director. Having done this, the first defendant proceeded to represent to PW5 by showing a set of accounts that indicated that the same assets which he had transferred to the second defendant and to Yam Chok, still remained as assets of the company. The first defendant had committed fraud after fraud. Another factor that I ought to mention is that under the lease-back agreement, not only did the plaintiff lose its assets, it was further B burdened with the additional liability of making monthly payments to lease-back the same assets it once owned.

As against the second defendant — Section 67 of the Act

The plaintiff argued that the lease-back agreement entered into by the C second defendant was in contravention of s 67 of the Act which reads as follows:

> Dealing by a company in its own shares, etc
>
> (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan D guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.
>
> (2) Nothing in subsection (1) shall prohibit — E
>
> (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;
>
> (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a F purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, or a subsidiary of the company including any director holding a salaried employment or office in the company or a subsidiary of the company, or
>
> (c) the giving of financial assistance by a company to persons, other than directors, bona fide in the employment of the company or of a G subsidiary of the company with a view to enabling those persons to purchase fully-paid, shares in the company or its holding company to be held by themselves by way of beneficial ownership.
>
> (3) If there is any contravention of this section, the company is, notwithstanding section 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act. H
>
> Penalty: Imprisonment for five years or one hundred thousand ringgit.
>
> (4) Where a person is convicted of an offence under subsection (3) and the Court, by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the Court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation I to the company or the person, as the case may be, of such amount as the Court specifies, and any such order may be enforced as if it were a judgment of the Court.

(5) The power of a Court under section 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under subsection (4) of this section from the liability to have such an order made against him.

(6) Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

It was argued that the second defendant, although aware that the value of the shares of the plaintiff was zero, nevertheless had wanted the plaintiff to pay him some money to recoup his losses, notwithstanding the fact that he knew that the plaintiff was running at a loss and would not be in a position to pay. He made no enquiries to ascertain how the plaintiff would be able to pay him.

There is one factor that the plaintiff has pointed out that has not, to my mind, been satisfactorily answered by the second defendant, in that, although the plaintiff had failed to effect any payment to him from 1985 onwards, the second defendant took no action to claim against the plaintiff. However, once the first defendant left the company in 1992, only then did the second defendant decided to exercise his right to commence his action against the company. The explanation given was that the plaintiff could not make ends meet, and that he had six years to sue, and that he could exercise his right to sue at any time within that period and that there is nothing sinister nor suspicious about that conduct. What is puzzling is that, even after the wait, there was no evidence that the company was in any better position. However, if the impecuniosity of the company was the reason, then surely the second defendant could have filed a suit in 1990, when RM500,000 was injected into the company through PW5.

To my mind, it is obvious that both the first and the second defendants jointly agreed to keep PW5 in blissful oblivion of the lease-back agreement and the sub-tenancy agreement, so that the second defendant could recoup as much of his losses as was possible. I cannot, but infer a conspiracy to injure on the part of both the first and second defendants as against the plaintiff. In his submission, the first defendant contended that the plaintiff had failed to prove fraud and conspiracy as against him. The facts as found by me clearly indicate both fraud and conspiracy as against both the first and second defendants.

Objection raised at trail

The second defendant took umbrage at the fact that the plaintiff was relying on s 67 of the Act when, in fact, the plaintiff had conceded to my ruling during the course of the trial that the validity of the lease-back agreement will not be challenged in these proceedings. My ruling was occasioned when counsel for the plaintiff was cross-examining the second defendant on the lease-back agreement. Counsel for the second defendant, Mr Harry,

A objected to that line of questioning on the basis that the validity of the agreement had not been challenged in the statement of claim by the plaintiff. Mr Ong, for the plaintiff, explained that it was their pleaded case that the defendants had arranged to pay out money of the plaintiff, even though such money ought not to have been paid out. Having heard that explanation, I overruled Mr Harry's objection and gave my ruling as
B follows:

> I find that for this case before me, the validity of the agreement is not being challenged. What counsel is suggesting is that money is being taken out of the company.

C In the circumstances, the second defendant's argument that the plaintiff was caught by my ruling is not correct. I was not concerned with the validity of the agreement at the time the objection was raised. The plaintiff is not claiming that the monies received by the second defendant under the lease-back agreement must be returned on the basis that the agreement is invalid.

D Lease-back agreement not pleaded

However, if the second defendant had raised objection when reference was made by Mr Ong during the cross-examination of the second defendant in respect of the lease-back agreement, on the basis that that agreement had not been pleaded, I would have upheld his objection and denied the plaintiff
E the right to proceed on that line of questioning. However, Mr Harry only raised objections to its validity. Counsel for the second defendant has also argued that the plaintiff had not pleaded that the lease-back agreement formed a part of 'a scheme of conspiracy to defraud'. This again pre-supposes the admission of the existence of the said agreement except that it
F was the second defendant's case that it was not pleaded and that it formed a part of the scheme. In other words, whilst the said agreement was not even pleaded, he had agreed to its existence, except to its validity. Whilst courts are ever vigilant to disallow evidence to be led on matters not pleaded when objections are taken, it is not the court's duty to point out to parties of such absence. However, where a party, by conduct or condescension, by
G indifference or indiscretion, allows for the inclusion of such unpleaded matters, then the courts will take it that such matters have become part of the case, and that evidence could be led in to support or to oppose such matters. In any case, whilst the plaintiff may not have pleaded the said agreement, the defendant had referred to that agreement in his defence without specifically mentioning it by stating that he had sued the plaintiff
H for monies due to him under that said agreement.

Does s 67(2)(c) of the Act assist the second defendant

However, alternatively, the second defendant argued that the plaintiff had failed to consider s 67(2)(c) which provided for the giving of financial
I assistance by a company to persons other than directors, who are in the bona fide employment of the company, with a view to enabling those persons to purchase fully-paid shares in the company to be held by

themselves by way of beneficial ownership. It was urged upon me to hold that the lease-back agreement fell squarely within s 67(2)(c) of the Act because when the lease-back agreement was executed on 2 January 1986, the first defendant and Duncan were in fact employees of the plaintiff and that the lease-back agreement was in fact giving financial assistance to the first defendant and Duncan, to enable the employees to purchase the fully-paid up shares.

I do not agree. This was not a case of giving financial assistance to purchase shares. In the lease-back agreement, the consideration for the second defendant agreeing to transfer his shares in the company to the first defendant was the transfer of the company's assets to the second defendant. This, clearly, is not what is envisaged by s 67(2)(c) of the Act.

The mischief rule

Finally, the second defendant very tenaciously argued that the court must consider the real mischief, if any, as envisaged by s 67 of the Act. Relying on *Skelton v SA Blue Metals* [1969] NZLR 955, a judgment of the Supreme Court of New Zealand which relied on its s 62 of the Companies Act 1955, which was almost in identical terms with our s 67, Mr Harry submitted that since the mischief, that s 67 intended to avert, was the unauthorized reduction of the capital of the company and to protect the interests of its creditors and contributories, no harm was done in this case. Again, I do not agree. It is the mode by which the financial assistance was obtained that is questionable. Clearly in this case, there is, not only the depletion of monies due to the company by such monies being paid out to the second defendant, but there is a depletion of the company's assets, by them being transferred to the second defendant and which assets the second defendant has leased back to the company, for which payments were being made. To my mind, this is not rendering financial assistance to the employees of the company to buy into the company. This is a cleverly planned subterfuge to deplete the company of its assets. The question to ask is, 'Has the company's financial resources been diminished, including its future resources, as a result of this lease-back agreement?' In my judgment, the first and second defendants created the mischief that was clearly envisaged by s 67 of the Act.

Should s 354(1) of the Act excuse the second defendant

The said section reads:

> Power to grant relief
>
> (1) If in any proceeding for negligence default breach of duty or breach of trust against a person to whom this section applies it appears to the Court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence default or breach the Court may relieve him either wholly or partly from his liability on such terms as the Court thinks fit.

Finally, Mr Harry argued that if I was of the view that s 67 of the Act has been contravened, then I ought to relieve the second defendant from his liabilities as the second defendant had acted honestly and reasonably, having regard to all the circumstances of the case. It is obvious that to be able to rely on this section, the second defendant must show that:

(a) he had acted honestly;

(b) he had acted reasonably; and

(c) it is fair to excuse him, having regard to all the circumstances of the case.

Based on my findings I cannot say that the second defendant has satisfied me in any one of the three requirements.

In applying s 448(1) of the Companies Act 1948, which is in pari materia with our s 354(1), Buckley J said in *Re Duomatic Ltd* [1969] 2 Ch 365 at p 377:

> ... The question which I have to ask myself is whether, in acting in the way in which he did, Mr Elvins acted reasonably. I do not think that he was acting in the way in which a man of affairs dealing with his own affairs with reasonable care and circumspection could reasonably be expected to act in such a case.

I accept and adopt this view.

Conspiracy

The plaintiff also rests its case on conspiracy on the part of the first, second and third defendants to injure the plaintiff. I had, in *Electro Cad Australia Pty Ltd & Ors v Mejata RCS Sdn Bhd & Ors* [1998] 3 MLJ 422, said at p 449, that:

> The law of conspiracy consists of an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means for the purpose of injuring another whereby the said act results in damage to the other (see *Sorrell v Smith* [1925] AC 700 and *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960).

The essential ingredients of the tort of conspiracy to injure are:

(a) that there is an agreement between two or more persons;

(b) for the purpose of injuring the plaintiff; and

(c) that the acts done in execution of that agreement resulted in damage to the plaintiff.

I am satisfied that on the evidence available, there was a conspiracy to injure between the first and second defendants. The very purpose of the lease-back agreement reeks of conspiracy. I have dealt with this aspect in dealing with the evidence earlier. All three essential ingredients to constitute the tort of conspiracy lie within the pages of the lease-back agreement. A conspiratorial grand design was hatched by the first and second defendants with the predominant purpose of stripping the plaintiff of its assets and then, almost adding insult to injury, by requiring the plaintiff to lease-back and pay for the very same assets that it once owned.

As to the issue that was pleaded that the lease-back agreement formed part of a scheme of conspiracy to defraud, it is my view that once the second defendant had, by conduct, conceded to the existence of the said agreement, then, so long as the evidence in respect of that agreement through witness, tendered to show that the said agreement indeed formed a scheme of conspiracy, I am well within my bounds to so make a finding. The allegation that he was taken by surprise cannot be sustained since he was aware of that agreement. The sub-lease agreement was entered into at about the same time as the lease-back agreement. The second defendant testified that as chairman of the plaintiff, the first defendant had to work under his supervision and report to him until the time he resigned. I, therefore, cannot but to conclude that the second defendant must have been informed of the sub-lease agreement by the first defendant. After all, it makes no sense for the second defendant to enter into the lease-back agreement on 2 January 1986, when he knew that the plaintiff had no money, unless he knew that under the sub-lease agreement, there will be money available to him.

Constructive trust

In *Lian Keow Sdn Bhd v Chelliah Paramjothy & Anor* [1988] 1 CLJ 57, Yusof Abdul Rashid J said (at p 58):

> As the instant case is a case in equity founded on breach of trust, it is trite law that in equity a person who receives trust property takes it subject to the trust if he has actual or constructive notice of the trust interest and that a person who receives trust property which he knows or ought to know is inconsistent with the terms of the trust, is accountable to the beneficiary under that trust. A stranger may be held liable to the beneficiary of a trust if he dishonestly allows himself to be used as an instrument of a breach of trust.

Since I have found that there was a conspiracy to injure between the first and second defendants, and since the first defendant is a trustee of the company and which knowledge, no doubt, is clearly within the second defendant, I have no hesitation in holding that what monies the second defendant had received from the first defendant pursuant to the lease-back agreement, is deemed to be held by him as a constructive trustee. The lease-back agreement was in fact executed to assist the second defendant to recover as much as possible of his investment, by way of payments towards the lease. Clearly, the advancement of payment by the first defendant on behalf of the plaintiff was in breach of trust, and the receipt of the said sum by the second defendant was with either actual or constructive knowledge of the breach, thus satisfying the two requirements to prove constructive trust as gleaned from *Chelliah Paramjothy & Anor*.

In the circumstances, I allow the plaintiff's claim as follows:

As against the first defendant:

(1) An order for an account of what is due to the plaintiff in respect of all monies received by the first defendant under the lease-back agreement for and on account of the plaintiff.

(2) An order for an account of what is due to the plaintiff in respect of all monies received by the first defendant under the agreement for electricity charges for and on account of the plaintiff.

(3) An order for payment to the plaintiff of the sums found due to the plaintiff on taking of the above accounts.

(4) An order for payment to the plaintiff of interest at 4% pa on the sums found due and payable from 1 January 1986, to the date of full payment.

As against the second defendant:

(1) An order for an account of what is due to the plaintiff in respect of all the monies received under the lease-back agreement for and on account of the plaintiff.

(2) An order for an account of what is due to the plaintiff in respect of all monies received under the agreement for electricity charges herein for and on account of the plaintiff.

(3) An order for payment to the plaintiff of the sums found due to the plaintiff on the taking of the above account.

(4) An order for payment to the plaintiff of interest at 4% pa on the sums found due and payable from 1 Janaury 1986, to the date of full payment.

As against both the first and second defendants:

(1) Damages for conspiracy to injure to be assessed by the deputy registrar.

(2) Interest on the said sum at 4% pa from 1 January 1986 to date of assessment.

(3) Costs.

Plaintiff's claim allowed.

Reported by Tan Cheng Siong